112TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
112–683

PRESERVING RURAL RESOURCES ACT OF 2012

SEPTEMBER 20, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MICA, from the Committee on Transportation and Infrastructure, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4278]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 4278) to amend the Federal Water Pollution Control Act with respect to permit requirements for dredged or fill material, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

PURPOSE OF THE LEGISLATION

The purpose of H.R. 4278 is to amend the Federal Water Pollution Control Act to clarify Congressional intent regarding exemptions from permit requirements for dredged or fill material.

BACKGROUND AND NEED FOR LEGISLATION

The Clean Water Act

In 1972, Congress passed the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the Clean Water Act or the CWA; 33 USC 1251 *et seq.*). The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The primary mechanism for achieving this objective is the CWA's prohibition on the discharge into a jurisdictional waterbody of a pollutant without a National Pollutant Discharge Elimination System (NPDES) permit. (*See* CWA §§ 301, 402.) NPDES permits are a basic regulatory tool of the CWA. The CWA also regulates, through a separate permit program, the discharge of dredged or fill material into jurisdictional waterbodies, including wetlands. (*See* CWA § 404.)

The Environmental Protection Agency (EPA) has the basic responsibility for administering and enforcing most of the CWA, including the NPDES permit program, and the Army Corps of Engineers (Corps) has lead responsibility for administering the dredge or fill (wetlands) permit program under section 404 of the CWA. Under the wetlands permitting program, it is unlawful for a facility to discharge dredged or fill materials into a jurisdictional waterbody unless the discharge is authorized by and in compliance with a dredge or fill (section 404) permit issued by the Corps.

Even though the Corps has the lead authority to implement the CWA's section 404 permit program, the EPA retains residual authority under the CWA to oversee, review, and object to the Corps' issuance of section 404 permits for the discharge of dredged or fill material into jurisdictional waters, to ensure that such permitting decisions meet the minimum requirements of the CWA. Once the EPA has approved a Corps section 404 permit, the implementation and interpretation of that permit is left to the Corps. Recently, however, the EPA has abandoned its proper role of generally overseeing the Corps' permitting program, and has inserted itself into the Corps' permit issuance process, often dictating policy for the Corps and second-guessing Corps' permitting decisions.

Section 404 permitting exemptions

In 1977, Congress made a deliberate policy choice to exempt ordinary farming, silviculture, ranching, and mining related activities (in CWA section 404(f)(1)) from the costly and burdensome requirements to obtain CWA permits when they are engaged in normal activities to prepare and maintain their land.

Congress recognized that the expansive reach of the Act threatened to impose a 404 permit requirement on literally thousands upon thousands of parties engaged in normal farming, silviculture, ranching, or mining related activities whose land may contain some water. The exemptions provided "for the first time statutory recognition that normal farming, ranching, and silviculture activities do not belong in this permit program," and "reemphasize that Con-

gress never intended these activities to be considered discharges of dredged or fill material." (*See* "A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act" (1978) (hereinafter, "1977 Legislative History"), at 351 (statement of Rep. Hammerschmidt).)

Section 404(f)(1) provides that the following discharges of dredged or fill material are not prohibited by or otherwise subject to regulation under CWA section 404 (or under CWA sections 301(a) or 402):

> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;
>
> (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
>
> (D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;
>
> (E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized; and
>
> (F) resulting from any activity with respect to which a State has an approved program under CWA section 208(b)(4), which meets the requirements of subparagraphs (B) and (C) of such section (dealing with programs for controlling the discharge or other placement of dredged or fill material, as part of an areawide waste treatment management planning process, and certain specified circumstances where a state has obtained approval to administer a permit program under CWA section 404).

While Congress intended to exempt ordinary farming, silviculture, ranching, or mining related activities from some of the requirements that are otherwise imposed on others who dredge or fill wetlands, Congress also intended for the exemptions to be applied reasonably. For example, during the debate in the House of Representatives on the conference report on the legislation that became the 1977 amendments to the CWA (H. Rept. 95–830), Congress recognized that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, and did not intend the exemptions to apply to discharges that convert extensive areas of water into dry land or extensively impede circulation or reduce the reach or size of a waterbody. (*See, e.g.,* 1977 Legislative History, at 420 (statement of Rep. Harsha).)

As a result, the section 404(f)(1) permitting exemptions contain specific language to limit the scope of the particular exemptions. (*See, e.g.,* 1977 Legislative History, at 420 (statement of Rep. Harsha).) In addition, a "recapture provision" (which repeats some of the limitations contained in certain particular permitting exemptions) was added to the exemptions, in section 404(f)(2):

> "(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section."

The recapture provision and the limitations contained in the particular permitting exemptions were intended to provide reasonable limits on the scope of the section 404(f)(1) permitting exemptions, and not to nullify the exemptions. For example, during debate in the House of Representatives on the conference report on the legislation (H.R. 3199, Public Law 95–217), Representative Harsha briefly discussed the provisions: "To assure that the extent of these exempted activities would not be misconstrued, paragraphs (f)(1)(D) and (E) and (f)(2) provide common sense limitations to protect the chemical, biological, and physical integrity of the nation's waters." (*See* 1977 Legislative History, at 420 (statement of Rep. Harsha) (emphasis added).) The exemptions and limitations reflect a delicate balance between protecting wetlands while allowing routine activities to go unimpeded.

Implementing the Section 404 permitting exemptions and limitations

For most of the past 35 years, the Corps (and the EPA, in its general oversight of the Corps' 404 permitting program) has generally interpreted the section 404 permitting exemptions and limitations, including the section 404(f)(2) recapture provision, reasonably as Congress intended. Recently, however, the Corps (and the EPA, as a result of inserting itself into the Corps' permit issuance process and dictating policy for the Corps) has begun to interpret the recapture provision so expansively and the section 404(f)(1) permitting exemptions so narrowly that the recapture provision now virtually swallows up the exemptions. Congress would not have included limitations in the individual permitting exemptions if the recapture provision was intended to be interpreted so broadly as to override and nullify the exemptions.

Effectively, the Corps and the EPA now are interpreting the section 404(f)(1) exemptions to be almost entirely subsumed by the recapture provision in section 404(f)(2), with the result that, while Congress provided a regulatory exemption for normal farming, silviculture, ranching, and mining related activities in one paragraph of the CWA, the Corps and the EPA now are taking it away with the next paragraph. The Corps and the EPA cannot take away administratively what Congress has legislated.

In response to the Agencies' recent actions, on March 28, 2012, Representative Hurt introduced H.R. 4278, the *Preserving Rural Resources Act of 2012,* to clarify Congress' original intent to provide exemptions from the section 404 permitting process for normal

farming, silviculture, ranching, and mining related activities by preserving these exemptions through circumscribing the scope of the recapture provision. By allowing each permitting exemption to stand on its own merits, without the Corps and the EPA negating their use through clever legal interpretations of the recapture provision, the legislation will allow members of the regulated community engaged in normal farming, silviculture, ranching, or mining related activities to shift their time and resources from wading through excessive and costly government bureaucracy and paperwork to utilizing the resources in place on their private property in ways that will expand production and create jobs.

HEARINGS

No hearings were held on H.R. 4278.

LEGISLATIVE HISTORY AND CONSIDERATION

On March 28, 2012, Representative Robert Hurt of Virginia introduced H.R. 4278, the *Preserving Rural Resources Act of 2012,* a bill to clarify Congressional intent regarding exemptions from permit requirements for dredged or fill material. On August 1, 2012, the Committee on Transportation and Infrastructure met in open session to consider H.R. 4278, and ordered the bill reported favorably to the House by record vote with a quorum present. The vote was 30 yeas to 19 nays.

An amendment was offered in Committee by Representative Edwards, which was defeated by record vote. The vote was 21 yeas to 27 nays. The amendment would have exempted the bill from applying to waters where a discharge of dredged or fill material would have an adverse impact on aquatic and wild life related to commercial or recreational activities or the quality or availability of water for agricultural or other purposes.

An amendment was offered in Committee by Representative Bishop of New York, which was defeated by record vote. The vote was 21 yeas to 28 nays. The amendment would have added several water infrastructure financing authorizations to the bill.

An amendment was offered in Committee by Representative Napolitano, which was defeated in a voice vote with a quorum present. The amendment would have exempted the bill from applying to waters where a discharge of dredged or fill material would have the potential to increase the risk of flooding.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the House of Representatives requires each committee report to include the total number of votes cast for and against on each record vote on a motion to report and on any amendment offered to the measure or matter, and the names of those members voting for and against. During consideration of H.R. 4278, a total of three record votes were taken.

Record votes were taken on amendments offered in Committee by Representative Edwards and Representative Bishop of New York. The Committee disposed of these two amendments by record vote as follows:

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
FULL COMMITTEE – ROLL CALL
U.S. HOUSE OF REPRESENTATIVE – 112TH CONGRESS

Number of Members: (33/26) Quorum: 30 Working Quorum: 20
Date: August 1, 2012 Presiding: Chairman Mica
Amendment or matter voted on: Edwards Amendment to H.R. 4278
Vote: 21 - 27

	Yeas	Nays	Present		Yeas	Nays	Present
Mr. Mica		X		*Mr. Larsen*	X		
Mr. Rahall	X			*Mr. Lipinski*	X		
Mr. Altmire	X			Mr. LoBiondo		X	
Mr. Barletta		X		Mr. Long		X	
Mr. Bishop	X			Mr. Meehan		X	
Mr. Boswell	X			*Mr. Michaud*	X		
Ms. Brown	X			Mr. Miller (CA)		X	
Dr. Bucshon		X		Ms. Miller (MI)			
Ms. Capito		X		*Mr. Nadler*	X		
Mr. Capuano	X			*Mrs. Napolitano*	X		
Mr. Carnahan	X			*Ms. Norton*	X		
Mr. Coble		X		Mr. Petri		X	
Mr .Cohen				Mr. Ribble		X	
Mr. Costello				*Ms. Richardson*			
Mr. Cravaack		X		Ms. Schmidt		X	
Mr. Crawford				*Mr. Shuler*			
Mr. Cummings	X			Mr. Shuster		X	
Mr. DeFazio	X			*Mr. Sires*	X		
Mr. Denham		X		Mr. Southerland		X	
Mr. Duncan		X		*Mr. Walz*	X		
Ms. Edwards	X			Mr. Young			
Mr. Farenthold		X					
Mr. Filner	X						
Mr. Fleischmann		X					
Mr. Gibbs		X					
Mr. Graves		X					
Mr. Guinta							
Mr. Hanna		X					
Dr. Harris							
Mrs. Herrera Beutler		X					
Ms. Hirono	X						
Mr. Holden							
Mr. Hultgren		X					
Mr. Hunter		X					
Mr. Johnson (IL)							
Ms. Johnson (TX)	X						
Mr. Landry		X					
Mr. Lankford		X					

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
FULL COMMITTEE – ROLL CALL
U.S. HOUSE OF REPRESENTATIVE – 112TH CONGRESS

Number of Members: (33/26) Quorum: 30 Working Quorum: 20
Date: August 1, 2012 Presiding: Chairman Mica
Amendment or matter voted on: Bishop Amendment to H.R. 4278
Vote: 21 - 28

	Yeas	Nays	Present		Yeas	Nays	Present
Mr. Mica		X		*Mr. Larsen*	X		
Mr. Rahall	X			*Mr. Lipinski*	X		
Mr. Altmire	X			Mr. LoBiondo		X	
Mr. Barletta		X		Mr. Long		X	
Mr. Bishop	X			Mr. Mechan		X	
Mr. Boswell	X			*Mr. Michaud*	X		
Ms. Brown	X			Mr. Miller (CA)		X	
Dr. Bucshon		X		Ms. Miller (MI)			
Ms. Capito		X		*Mr. Nadler*	X		
Mr. Capuano	X			*Mrs. Napolitano*	X		
Mr. Carnahan	X			*Ms. Norton*	X		
Mr. Coble		X		Mr. Petri		X	
Mr .Cohen				Mr. Ribble		X	
Mr. Costello				*Ms. Richardson*			
Mr. Cravaack		X		Ms. Schmidt		X	
Mr. Crawford				*Mr. Shuler*			
Mr. Cummings	X			Mr. Shuster		X	
Mr. DeFazio	X			*Mr. Sires*	X		
Mr. Denham		X		Mr. Southerland		X	
Mr. Duncan		X		*Mr. Walz*	X		
Ms. Edwards	X			Mr. Young			
Mr. Farenthold		X					
Mr. Filner	X						
Mr. Fleischmann		X					
Mr. Gibbs		X					
Mr. Graves		X					
Mr. Guinta							
Mr. Hanna		X					
Dr. Harris		X					
Mrs. Herrera Beutler		X					
Ms. Hirono	X						
Mr. Holden							
Mr. Hultgren		X					
Mr. Hunter		X					
Mr. Johnson (IL)							
Ms. Johnson (TX)	X						
Mr. Landry		X					
Mr. Lankford		X					

The final recorded vote was to order the bill favorably reported to the House.

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
FULL COMMITTEE – ROLL CALL
U.S. HOUSE OF REPRESENTATIVE – 112TH CONGRESS

Number of Members: (33/26) Quorum: 30 Working Quorum: 20
Date: August 1, 2012 Presiding: Chairman Mica
Amendment or matter voted on: Ordering HR. 4278 reported
Vote: 30 - 19

	Yeas	Nays	Present		Yeas	Nays	Present
Mr. Mica	X			*Mr. Larsen*		X	
Mr. Rahall		X		*Mr. Lipinski*		X	
Mr. Altmire	X			Mr. LoBiondo	X		
Mr. Barletta	X			Mr. Long	X		
Mr. Bishop		X		Mr. Meehan	X		
Mr. Boswell		X		*Mr. Michaud*	X		
Ms. Brown		X		Mr. Miller (CA)	X		
Dr. Bucshon	X			Ms. Miller (MI)			
Ms. Capito	X			*Mr. Nadler*		X	
Mr. Capuano		X		*Mrs. Napolitano*		X	
Mr. Carnahan		X		*Ms. Norton*		X	
Mr. Coble	X			Mr. Petri	X		
Mr. Cohen				Mr. Ribble	X		
Mr. Costello				*Ms. Richardson*			
Mr. Cravaack	X			Ms. Schmidt	X		
Mr. Crawford				*Mr. Shuler*			
Mr. Cummings		X		Mr. Shuster	X		
Mr. DeFazio		X		*Mr. Sires*		X	
Mr. Denham	X			Mr. Southerland	X		
Mr. Duncan	X			*Mr. Walz*		X	
Ms. Edwards		X		Mr. Young			
Mr. Farenthold	X						
Mr. Filner		X					
Mr. Fleischmann	X						
Mr. Gibbs	X						
Mr. Graves	X						
Mr. Guinta							
Mr. Hanna	X						
Dr. Harris	X						
Mrs. Herrera Beutler	X						
Ms. Hirono		X					
Mr. Holden							
Mr. Hultgren	X						
Mr. Hunter	X						
Mr. Johnson (IL)							
Ms. Johnson (TX)		X					
Mr. Landry	X						
Mr. Lankford	X						

COMMITTEE OVERSIGHT FINDINGS

With respect to the requirements of clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives does not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 has been timely submitted prior to the filing of the report and is included in the report. Such a cost estimate is included in this report.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the enclosed cost estimate for H.R. 4278 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 21, 2012.

Hon. JOHN L. MICA,
Chairman, Committee on Transportation and Infrastructure, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4278, the Preserving Rural Resources Act of 2012.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 4278—Preserving Rural Resources Act of 2012

The Clean Water Act (CWA) authorizes the Environmental Protection Agency (EPA) and the Army Corps of Engineers to grant permits for discharging dredge or fill material into waters of the United States. Some activities, including those related to farming, forestry, and ranching, result in discharges that in some circumstances are exempt from such permit requirements. However, if those activities would impair the flow or circulation of water by filling wetlands, for example, then a CWA permit is required. H.R. 4278 would not require any of those activities to have a CWA permit under any circumstances.

CBO estimates that enacting this legislation would not have a significant impact on the federal budget because it would not result in a significant change in workload for either EPA or the Corps. Under current law, the Corps is authorized to collect and spend fees for issuing permits under the CWA; therefore, pay-as-you-go procedures apply to H.R. 4278, However, CBO expects that the net

change in collections and spending under the bill would be negligible.

H.R. 4278 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Susanne S. Mehlman. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goal and objective of this legislation is to clarify Congressional intent regarding exemptions from permit requirements for dredged or fill material.

ADVISORY OF EARMARKS

Pursuant to clause 9 of rule XXI of the Rules of the House of Representatives, the Committee is required to include a list of congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives. No provision in the bill includes an earmark, limited tax benefit, or limited tariff benefit under clause 9(e), 9(f), or 9(g) of rule XXI.

FEDERAL MANDATE STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the "Unfunded Mandates Reform Act" (P.L. 104–4).

PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt state, local, or tribal law. The Committee states that H.R. 4278 does not preempt any state, local, or tribal law.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act are created by this legislation.

APPLICABILITY OF LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (P.L. 104–1).

SECTION-BY-SECTION ANALYSIS OF LEGISLATION

Section 1. Short title

Section 1 states that the Act may be cited as the "Preserving Rural Resources Act of 2012."

Section 2. Permits for dredged or fill material

H.R. 4278 amends section 404(f) of the Clean Water Act, which provides exemptions from the requirement to obtain a permit for the discharge of dredged or fill material. Section 2 of the bill amends section 404(f) by:

(1) Amending section 404(f)(1) by striking the following introductory language of paragraph (1): "Except as provided in paragraph (2) of this subsection, the discharge", and inserting in its place: "The discharge"; and

(2) Amending section 404(f)(2) by striking the following language of paragraph (2): "having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced," and inserting in its place: "having as its purpose bringing an area into a use not described in paragraph (1)".

The changes that section 2 of the bill makes to section 404(f) of the CWA are intended to clarify Congress' original intent to provide reasonable exemptions from the section 404 permitting process for normal farming, silviculture, ranching, and mining related activities by preserving these exemptions through circumscribing the scope of the recapture provision.

Section 2 of the bill amends the recapture provision to allow normal farming, silviculture, ranching, and mining related activities to be conducted without the requirement to obtain a section 404 permit, as long as those activities do not result in bringing an area into a use not described in section 404(f)(1). As long as an area is maintained in a use that is described in section 404(f)(1), and the limitations contained in the particular permitting exemption in 404(f)(1) are also met, a 404 permit would not be required.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL WATER POLLUTION CONTROL ACT

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TITLE IV—PERMITS AND LICENSES

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PERMITS FOR DREDGED OR FILL MATERIAL

SEC. 404. (a) * * *

* * * * * * *

(f)(1) [Except as provided in paragraph (2) of this subsection, the discharge] *The discharge* of dredge or fill material—

(A) * * *

* * * * * * *

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity [having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced,] *having as its purpose bringing an area into a use not described in paragraph (1)* shall be required to have a permit under this section.

* * * * * * *

DISSENTING VIEWS

Despite the misleading short title of this legislation, H.R. 4278 has far too little to do with "preserving rural resources" and too much to do with creating a massive Clean Water Act (Act) loophole for a variety of industrial-related activities, including industrial farming and timber-harvesting, ranching, and construction.

To be clear, this legislation is not about protecting family farmers or preserving our nation's rural heritage. It is about overturning the delicate balance that was reached decades ago by this Committee between protecting the environment and allowing narrowly defined activities, including normal farming, ranching, and forestry activities, to continue because these activities cause little or no adverse effects on the environment.

H.R. 4278, which has never been subject to a Congressional hearing, overturns 25 years of precedent that was set in motion in the 1977 Amendments to the Act. In that legislation (Pub. L. 95–217), Congress reached a compromise that balanced the desire to enact far-reaching protections over the nation's waters with the practical, day-to-day operations of farmers, ranchers, forestry owners, and a host of other industrial sectors.

That compromise, enacted as section 404(f) of the Act, was Congress' response to industry's concern that the comprehensive application of the Act might needlessly delay or complicate routine activities through the 404 permit process.

As a result, section 404(f) created a list of "activity-based" exemptions from the permitting requirements of section 404, including exemptions for normal farming, forestry, and ranching activities, as well as activities related to certain construction and maintenance projects, such as levees, dams, causeways, and other transportation structures.

Yet, this compromise also imposed significant limits on the section 404(f) activity-based exemptions. According to section 404(f)(2), an activity-based exemption does not apply if the activity changes the use of the water, such as converting wetlands to dry land, or reduces the reach or impairs the flow of such waters. For example, if the activity "converts" navigable waters to dry land, that activity would not be exempt from the requirements of section 404, but may still be pursued under the normal permitting process.

Unfortunately, the proponents of H.R. 4278 seek to undue this compromise under the guise of protecting family farmers and ranchers from regulatory overreach. However, as noted by outside stakeholders supporting H.R. 4278, the real intent of H.R. 4278 is to ensure that the Clean Water Act regulatory program simply does not apply to agricultural (or other) lands—in any instance—and regardless of any adverse impacts on downstream water quality or the related environment.

This legislation would overturn decades of legislative and judicial precedent, including a 2002 decision of the U.S. Supreme Court,[1] as well as create a massive legal-loophole that would exempt, from environmental review or mitigation, a litany of industrial or construction related activities, even if those activities destroy water quality or wetlands or have massive adverse downstream impacts.

Under H.R. 4278, any activity that is even remotely related to farming, forestry, ranching, or a host of other construction-related activities would be exempt from the permitting requirements of the Clean Water Act, even if the activity involved the draining, filling, or destruction of existing wetlands.

For example, if H.R. 4278 were enacted, businesses could destroy thousands of acres of cypress swamps along the Gulf Coast to make mulch for home gardens, without Federal oversight or permit review. These fragile wetlands, which provide critical hurricane protection for coastal communities of Louisiana, Alabama, and Florida, are coveted by the mulch and hardwood lumber industries, but have been sustained, to a great extent, because of the Act's permitting protections. However, if H.R. 4278 were enacted, these areas could be clear-cut, drained, and converted for other purposes (such as agriculture),[2] destroying this historic Gulf Coast habitat, and exposing these communities to greater storm damage from coastal storms.

Similarly, if this bill were enacted, industrial farmers could plow under countless acres of wetlands and aquifer recharge areas, including areas specifically-created to mitigate potential downstream contamination, and not be required to undertake an environmental review or to address downstream impacts. Similarly, real estate developers could cause irreparable harm to the availability or quality of water in agricultural areas, such as California's Central Valley, without the existing environmental review provided by the Act.[3]

Unfortunately, enactment of H.R. 4278 could have the exact opposite effect of its stated purpose of "preserving rural resources". By repealing existing Federal protections against activities that change the use of an area or impair or reduce the flow, circulation, or reach of a waterbody, developers could make an end-run around

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[1] *See Borden Ranch Partnership* v. *United States Corps of Engineers*, 537 U.S. 99 (2002).

[2] In *Avoyelles Sportsmen's League, Inc.,* v. *Marsh,* the U.S. Fifth Circuit Court of Appeals ruled that the section 404(f) "normal farming activities" exemption did not apply where a developer proposed to clear cut 80,000 acres of cypress forests in Avoyelles Parish, Louisiana, and convert this land to agricultural use (specifically soybean production). *See* 715 F.2d 897, 926 (5th Cir. 1990). According to the Court, the "purpose and effect of the landclearing activities . . . was to bring 'an area of the navigable waters into a use to which it was not previously subject'. . . so that the property could be changed from a forest to a soybean field." If H.R. 4278 were enacted, it is conceivable that industry would argue this activity was exempt from section 404 of the Clean Water Act, because both uses could be contemplated as a "use described in paragraph (1)."

[3] *In Borden Ranch Partnership* v. *United States Army Corps of Engineers*, a real estate developer was fined under the Clean Water Act for using bulldozers to "radically alter[] the hydrological regime of the protected wetlands." *See* 261 F.3d 810, 816 (9th Cir. 2001). In overturning a legal challenge to the Clean Water Act fine, the U.S. Ninth Circuit Court of Appeals ruled that the section 404(f) "normal farming activities" exemption did not apply where a developer converted "ranch land to orchards and vineyards [by] bringing the land "into a use to which it was not previously subject". According to the Court, "[although] the Corps cannot regulate a farmer who desires 'merely to change from one wetland crop to another,' activities that require 'substantial hydrological alterations' require a permit" (citing *United States* v. *Akers*, 765 F.2d 814, 820 (9th Cir. 1986)). In 2002, the U.S. Supreme Court upheld the decision of the Ninth Circuit. If H.R. 4278 were enacted, it is conceivable that industry would argue this activity was exempt from section 404 of the Clean Water Act, because both uses could be contemplated as a "use described in paragraph (1)."

the Act by encouraging activities that drain or otherwise convert wetlands to dry-land (uplands). After a wetland's hydrology is removed, many of these areas could no longer be subject to Clean Water Act protections, and would be ripe for further development, including conversion from agricultural lands to commercial or residential development. It is not hard to imagine how, under H.R. 4278, unscrupulous developers could prey on unsuspecting farmers, by encouraging farmers to drain their fertile cropland in order to then convert the land to grow "houses" rather than crops. In short, while this legislation claims to "preserve rural resources", H.R. 4278, actually, may hasten the conversion of farmland to subdivisions.

Proponents of H.R. 4278 have claimed this legislation is necessary to prevent the regulatory overreach of the Corps of Engineers (Corps) or the Environmental Protection Agency (EPA). Their claims are based on the argument that the Corps and EPA have limited, by regulatory action, existing statutory exemptions for "normal farming, silviculture, and ranching activities," as well as an enumerated list of other industrial-related activities described in section 404(f)(1).

For example, in a letter to the sponsor of H.R. 4278, an agricultural stakeholder group supporting this legislation highlighted anecdotal instances where "EPA and the Corps have narrowed these important exemptions," including "regulating the equipment farmers use to plow and regulating how deep they plow" and "preventing farmers and ranchers from rotating their use of private land between pasture, row crop and tree crop enterprises."

While industry may view these proposed activities as "normal", as noted earlier, these activities can have a dramatic impact on the quality and availability of water in the region, and, therefore are appropriately covered by the existing "recapture provisions" of section 404(f)(2). Nothing in section 404 prevents industry from proposing such activities; however, approval for these activities in navigable waters is more appropriately pursued under the normal section 404 review process.

It is disingenuous for proponents of H.R. 4278 to suggest that Congress intended to include activities that adversely affect the circulation or flow of navigable waters or change the use of such waters when it approved section 404(f) in 1977. The legislative history, in fact, states exactly the opposite.

For example, the 1977 Conference Report to accompany H.R. 3199 (H. Report 95–830) describes section 404(f) as follows:

> The conference substitute also adds a new subsection (f) which provides that the discharge of dredged or fill material (1) from normal farming, silviculture, and ranching activities, (2) for the purpose of maintenance (including emergency reconstruction of recently damaged parts) of currently serviceable structures, (3) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance of drainage ditches, (4) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters, (5) for the purpose of construction or maintenance of farm roads or

> forest roads, or temporary roads for moving mining equipment, where such roads are constructed in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized, (6) resulting from any activity with respect to which a State has an approved program under section 208(b)(4) which meets the requirements of subparagraph (B) and (C) of such section, is not prohibited by or otherwise subject to regulation under section 404 of 301(a) or 402 of this Act (except for effluent standards or prohibitions under 307). **This subsection (f) shall not apply if the discharge of dredged or fill material into the navigable waters is incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.** [emphasis added]

During consideration of the Conference Report on the House floor, House conferee, Representative William Harsha (R–OH) noted that:

> New subsection (f) of section 404 provides that Federal permits will not be required for **narrowly defined activities** specifically identified in paragraphs A–F that cause little or no adverse effects either individually or cumulatively. To assure that the extent of these exempted activities will not be misconstrued, paragraphs (f)(1)(D) and (E) and (f)(2) provide common sense limitations to protect the chemical, biological, and physical integrity of the Nation's waters. While it is understood that some of these activities may necessarily result in incidental filling and insignificant harm to aquatic resources, **these exemptions do not apply to discharges that convert more extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.** [emphasis added]

In addition, during Senate consideration of the Conference Report, Senate conferee, Senator Malcom Wallop (R–WY) noted that:

> The conferees worked with the corps and the Environmental Protection Agency to insure that the amendments are carefully worded to provide protection from harmful activities, while reducing unnecessary government interference . . . The amendment clarifies that normal farming, ranching and silvicultural activities such as plowing, seeding, cultivating, and harvesting, as well as minor drainage and soil and water conservation practices performed in uplands, were not intended to require 404 permits. **The amendment also excludes from permit requirements, discharges of dredged or fill material in conjunction with [listed 404(f)(1)] activities that will cause little**

or no adverse effects either individually or cumulatively. [emphasis added]

In our view, the scope of activities covered by section 404(f) has been explicitly outlined in the legislative history of the 1977 Amendments to the Clean Water Act, and has been consistently implemented by the Corps and EPA, and subsequent rulings of the courts. The scope of activities that industry proposes as reasons for enactment of H.R. 4278 go well beyond those contemplated in the legislative history of section 404(f)—namely activities that will cause little or no adverse effects on the Nation's waters, either individually or cumulatively.

AMENDMENTS OFFERED DURING COMMITTEE MARKUP

Protection of hunting and fishing resources and irrigated agriculture

During the markup of H.R. 4278, Representative Donna F. Edwards offered an amendment to restore existing Clean Water Act protections over dredge and fill activities that may be detrimental to certain commercial and recreational activities, including hunting and fishing, as well as to the quality or availability of water for agricultural or other commercial purposes.

In short, this amendment recognizes that substantial economic benefits are provided by Clean Water Act protections over certain waterbodies and wetlands.

For example, according to the U.S. Fish and Wildlife Service, approximately 87.5 million U.S. residents fished, hunted, or watched wildlife in 2006. They spent over $122 billion in pursuing their recreational activities, contributing millions of jobs in industries and businesses that support wildlife-related recreation.

Yet, under the provisions of H.R. 4278, the valuable waters and wetlands relied on as habitat for fish and wildlife could be destroyed with little or no Federal oversight or review. Accordingly, the economic benefits and enjoyment provided to millions of American families could be eliminated for the benefit of a few industrial sectors.

Similarly, the warm waters of the Atlantic Ocean and the Gulf of Mexico host proactive fisheries for a wide variety of shellfish and finfish. In many instances, juvenile fish rely on coastal waters and habitat for survival, and for replenishing the vibrant commercial fishing industry in coastal waters. According to the National Oceanic and Atmospheric Administration, the U.S. seafood industry supports approximately one million full- and part-time jobs, nationwide, and generates annual sales in excess of $116 billion.

Yet, under the provisions of H.R. 4278, the valuable coastal waters and habitat for both shellfish and finfish could be destroyed with little or no Federal oversight or review. Again, the economic benefits currently shared among commercial fishing interests could be decimated for the benefit of a few industrial sectors.

Finally, this amendment recognizes impacts to one portion of a watershed can have adverse impacts on the availability and quality of waters in other areas, including waters used for irrigation or other commercial purposes.

It would be ironic if H.R. 4278 was enacted without the Edwards amendment, because it would seem to say that, in fact, every man is for himself, and that even if an upstream activity would cause downstream farmers to lose their vital irrigation waters, supporters of this bill can accept this fact.

As many portions of this nation are facing the worst drought in recent-memory, we hope that proponents of H.R. 4278 can recognize that water is a finite resource, and needs to be conserved, and if possible, reused and shared for the greater good. Yet, as drafted, H.R. 4278 allows valuable water sources, including irrigation sources, to be destroyed with little or no Federal oversight or review. Again, the economic benefits currently shared among national agricultural interests could be decimated for the benefit of a few industrial sectors.

Unfortunately, the amendment offered by Representative Edwards was defeated by a vote of 21–27.

Protecting communities from an increased risk of flooding

During the markup of H.R. 4278, Representatives Grace F. Napolitano and Russ Carnahan offered an amendment to address another concern created by enactment of H.R. 4278—the increased likelihood of downstream flooding that will result from the boundless conversion and destruction of waters and wetland contemplated by this bill.

Over the past decade, this nation has witnessed a dramatic increase in the frequency and severity of flooding events. Many of these flooding events can be directly traced back to continued development of floodplains, and either ineffective or improper mitigation of impacted watersheds.

Under H.R. 4278, further development of natural storage areas, such as wetlands, will continue, and potentially at rates not seen since before enactment of the Clean Water Act.

This is the wrong policy choice for a number of reasons, but most significantly for placing more people, more properties, and more livelihoods in harm's way of potential flooding events.

The amendment offered by Representatives Napolitano and Carnahan would preserve existing Clean Water Act review of activities that may have significant individual and cumulative impacts on downstream communities. This amendment would require activities that have "the potential to increase the risk of flooding, including flooding in a State other than the one in which the discharge will occur, or flooding that adversely impacts public infrastructure, including infrastructure related to transportation systems, flood damage reduction projects, or power generation" to be pursued under the traditional 404 permit process, and not be collectively exempt from all Clean Water Act review.

This common sense amendment recognizes that activities which drain or fill waters and wetlands divert these waters (and any future excess precipitation runoff) somewhere else in the watershed—in essence, leaving these waters for some other downstream interests to address. If enacted as currently drafted, H.R. 4278 would force downstream landowners and communities to take corrective actions (and expend potentially significant additional resources) to avoid any increased risk of flooding from unconstrained upstream

development. The reasons why proponents of H.R. 4278 seem to ignore the fact that this legislation increase the risk of downstream flooding are unknown, as, for decades, farmers, foresters, and ranchers have been able to carry out their professions under the existing Clean Water Act protections, while, at the same time, taking common sense steps to avoid adversely impacting the lives and livelihoods of the American public.

As Ms. Napolitano noted during consideration of this amendment at markup, "It would seem to me that in times when we are seeing increased extreme rain events that we need to ensure proposed development and land actions do not exacerbate flooding impacts to downstream districts."

The proponents of H.R. 4278 raise concerns about reducing the burdens on farmers, ranchers, and forestry operations; yet, they ignore the fact that this legislation simply shifts those burdens (and those flood waters) to average American families and the U.S. taxpayer—who will be forced to come in to provide disaster assistance when our towns and communities face greater flooding risks from this legislation.

Unfortunately, the amendment offered by Representatives Napolitano and Carnahan was defeated by a voice vote.

Investing in water infrastructure: Job creation and protection of the environment

During the markup of H.R. 4278, Subcommittee Ranking Member Timothy H. Bishop offered an amendment to ensure that the Committee fulfills its responsibility to our constituents, our communities, and this Congress by reauthorizing the Clean Water State Revolving Fund, as well as implement several innovative financing mechanisms, similar to concepts supported by the Subcommittee Chairman, including an alternative water infrastructure proposal to better leverage scarce Federal dollars modeled on the popular Transportation Infrastructure Finance and Innovation Act (TIFIA) program for highways that was significantly expanded in the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub L. 112–141).

To be clear—the Bishop amendment is strictly an authorization of funds, and is subject to appropriations. Any impact on direct spending is offset, and, in the view of the Congressional Budget Office, it does not score. Any argument to the contrary is simply an excuse for inaction.

For the past year, Committee Democrats have been working in good faith, with outside stakeholders and across the aisle, to reach consensus on the best way to renew the Federal commitment to funding wastewater infrastructure. That effort culminated in the introduction of bipartisan legislation, H.R. 3145, the Water Quality Protection and Job Creation Act of 2011, which was introduced in October of last year and is cosponsored by several members of this Committee from both sides of the aisle.

In fact, more than 100 organizations strongly support H.R. 3145, including the Associated General Contractors of America, the National Association of Clean Water Agencies, Food and Water Watch, the Water Environment Federation, the National League of Cities, the Water Infrastructure Network, the American Society of

Civil Engineers, the National Construction Alliance II, and the American Public Works Association, among many others.

This nation faces an impending water infrastructure crisis. EPA has estimated that there is over $300 billion in water infrastructure need across the nation with many experts arguing that the nation's need is far greater. In July 2012, during a Water Resources and Environment Subcommittee hearing about EPA's Integrated Planning process, Subcommittee members heard from several witnesses who reaffirmed that additional Federal investment in water infrastructure is desperately needed in their communities.

So great is the importance of the Nation's water infrastructure that it has been recognized by this Committee in each of the last five Congresses, with bills to address the growing need supported by former-Chairmen Shuster, Young, and Oberstar.

In addition, in the 111th and 110th Congresses, some of our Republican Committee colleagues opposed water infrastructure legislation because of philosophical concerns. The dissenting views on H.R. 1262 in the 111th Congress (H. Rept. 111–26):

> The reauthorization of the Clean Water State Revolving Loan Fund (SRF) Program is an important step towards addressing the needs of our critical and aging wastewater infrastructure. We welcome the environmental improvements that many provisions in this bill would bring. However, while H.R. 1262 represents an important step forward for clean water in many respects, it also takes a significant step backwards by mandating and expanding upon the past application of the Davis-Bacon Act's prevailing wage requirements in the SRF program.

Very similar concerns were also expressed in dissenting views to H.R. 720 in the 110th Congress (H. Rept. 110–30).

However, last year Congress permanently resolved the Davis-Bacon issue, in relation to water infrastructure, with enactment of the Consolidated Appropriations Act, 2012 (Pub. L. 112–74).[4]

Therefore, the two concerns previously cited as impediments to advancing water infrastructure legislation—Davis-Bacon and cost—have been resolved. The Appropriations Act resolved the Davis-Bacon issue; and the Bishop amendment does not contain any direct spending that is not offset in the bill, is compliant with Pay-Go and Cut-Go and does not score. Furthermore, the Chairman has the authority to strike any provision of a bill, reported by the Committee that would cause a violation of the Budget Act or a Rule XXI Cut-Go Point-of-Order.

Just like the recently enacted surface transportation program (Pub. L. 112–141), the need for investing in wastewater infrastructure is enormous and reauthorizing and reforming programs to rebuild our crumbling wastewater infrastructure systems will create thousands of jobs. For every $1 billion invested in wastewater infrastructure, this nation can create as many as 33,000 jobs in com-

[4] For fiscal year 2012 and each fiscal year thereafter, the requirements of section 513 of the Federal Water Pollution Control Act (33 U.S.C. 1372) shall apply to the construction of treatment works carried out in whole or in part with assistance made available by a State water pollution control revolving fund as authorized by title VI of that Act (33 U.S.C. 1381 et seq.), or with assistance made available under section 205(m) of that Act (33 U.S.C. 1285(m)), or both. *See* Pub. L. 112–74 (125 Stat. 1020).

munities across America while improving public health and the environment.

Unfortunately, the Bishop amendment was defeated by a vote of 21–28. This defeat marks a missed opportunity, not only in terms of what this Committee should be doing to promote good-paying jobs here at home, but also in meeting its long-standing obligation to protect the Nation's water resources and environment.

CONCLUSION

Despite the claims to the contrary, H.R. 4278 marks a massive expansion of the 404(0(1) exemptions already provided for normal farming, forestry, and ranching activities as well as other industrial-related activities, allows for unconstrained dredging, drainage, and filling of wetlands and streams, and has a massive adverse impact on the nation's water quality and quantity, the protection of lives and livelihoods, and the overall condition of the nation's environment.

Our predecessors in Congress reached a fair compromise between promoting economic activities, including normal farming-related activities, and protecting the environment. Yet, in a dramatic overreach, H.R. 4278 guts this existing balance to the economic benefit of a distinct group of outside stakeholders and industrial interests.

For these reasons, we oppose enactment of H.R. 4278.

TIMOTHY H. BISHOP.
GRACE F. NAPOLITANO.
DONNA F. EDWARDS.

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